

**UNITED STATES BUREAU OF RECLAMATION'S CLOSING BRIEF
FOR THE STATE WATER RESOURCES CONTROL BOARD'S
JULY 21, 2008 HEARING ON PROPOSED REVOCATION OF AUBURN DAM
PROJECT PERMITS 16209, 16210, 16211, 16212 OF THE UNITED STATES
BUREAU OF RECLAMATION**

INTRODUCTION

On July 21, 2008, the State Water Resources Control Board (Board) conducted a hearing on the proposed revocation of Permits 16209, 16210, 16211, and 16212 for the Auburn Dam Project. The primary issues discussed during that hearing, as identified in the April 28, 2008 notice for the hearing are:

Should Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637) be revoked in accordance with Water Code section 1410? Did Reclamation prosecute with due diligence and complete construction of the project and apply the water to beneficial use as contemplated by the permits and in accordance with the Water Code and the rules and regulations of the State Water Board?

Reclamation's position is that the Board should not revoke the permits for Auburn Dam. Reclamation reiterates its position that it has proceeded with reasonable due diligence to construct the project and apply the water to beneficial use within the limitations on construction of the project imposed by Congress.

Reclamation continues to believe that Auburn Dam is a viable project, and it disagrees with the prosecution team's assertion that water right permits for Auburn Dam would be

placed in “cold storage” if the permits were not revoked. The prosecution team’s arguments regarding the permits and the Auburn Dam project are incorrect and speculative, and oversimplify the history, size, complexity, and legislative debate surrounding this project. In addition, the prosecution team’s arguments do not take into account the serious issues facing California in maintaining an adequate future water supply and the ability of an Auburn Dam to become an asset in that endeavor. The Board should, in the interest of comity and of the public interest, leave the future of Auburn Dam, a federally authorized project, to be debated and deliberated in Congress.

DISCUSSION

Contrary to assertions made at the hearing by the California Sportfishing Protection Alliance (CSPA) and Friends of the River (FOR), Reclamation is not requesting that the Board apply a different set of rules and regulations to the Federal Government. In the words of Board staff member Kathy Mrowka, water right holders should be treated fairly and equitably. It is axiomatic that fair and equitable treatment does not mean that every water right permit must be administered in precisely the same manner, regardless of circumstances; rather, it means that the circumstances unique to the water right holder and that holder’s permit(s) should be taken into account. In the case of Reclamation’s Auburn Dam permits, a request that the Board use its discretion in applying applicable state statutes and regulations regarding due diligence and revocation is simply a request for fairness and equity. Reclamation’s position is that the responsibility of the Board in its undertaking of this matter is substantially more than a ministerial task of looking up the dates contained in Reclamation’s permits for completing construction and putting water to beneficial use, and requires a full and fair consideration of all relevant facts and

circumstances. The Board's rules and regulations, for good reason, give the Board wide discretion in taking into account the facts and circumstances of a specific situation in making a determination of whether cause exists to revoke and, even if cause were found to exist, whether revocation is appropriate.

Reclamation's position has been, and continues to be, that the Board has full discretion to find that Reclamation has proceeded with reasonable due diligence under the terms of its permits despite obstacles which Reclamation did not create and could not reasonably avoid, specifically, the decisions of Congress regarding the appropriation of funds to enable Reclamation to implement this federally authorized project. Therefore, the "lack of finances" caused by the decisions of Congress are "incident to the enterprise" (i.e., the project), and not the person (i.e., Reclamation), and do not create a basis for revocation. None of the other parties to this proceeding have presented any evidence or arguments refuting these facts. Consequently, Reclamation submits that the Board should preserve the existing water rights for Auburn Dam in order to allow the Congress to fully and freely deliberate the future of this federally authorized project, as well as the future of the Federal owned property rights existing in the form of the Auburn Dam permits.

CSPA and FOR claimed at the hearing that Auburn Dam will never be built since, allegedly, there is no Congressional interest in construction. However, at the hearing, State Senator Tom McClintock, a candidate for California's 4th Congressional District, passionately pleaded with the Board regarding the need for Auburn Dam, and asked that the Board not revoke Reclamation's permits. A representative of Congressman Dan

Lundgren also requested at the hearing that the Board not revoke Reclamation's permits. In addition, on May 16, 2008, 19 members of the California Congressional delegation sent a letter to Governor Schwarzenegger in support of a multi-purpose Auburn Dam and in opposition to revocation. And despite FOR's unsubstantiated claim that "[n]either of California's U.S. Senators" . . . nor "(any) Committee chair nor member of the leadership of the House or Senate supports the dam . . ." (FOR Closing Brief, at 6), **the fact remains that the record contains no statements from any member of Congress in favor of revocation.**¹

Reclamation would like to impress upon the Board that Congress, including the present Congress simply could have deauthorized Auburn Dam at any time if it were no longer interested in pursuing the project. Congress has not done so. Also, it is notable that the Central Valley Project Improvement Act, an Act of Congress making sweeping reforms to the Central Valley Project (CVP), made absolutely no provision for deauthorization of Auburn Dam as an integral part of the CVP.

Reclamation reiterates its position that Auburn Dam remains a project of interest to Congress, and that Congress will continue to debate the future funding and construction of Auburn Dam until such time that it is either reauthorized or deauthorized. For that reason, Reclamation believes that the Board, in exercising its discretion, should take a

¹ At the hearing, representatives of CSPA and FOR claimed that the support for Auburn Dam by members of Congress in the current minority party should not count. The fact remains, however, that the only statements from Congress in the record for this matter oppose revocation, no matter what irrelevant claims CSPA or FOR have made in an attempt to discredit those statements.

similar approach and let Congress address the disposition of this federally authorized project and its associated water rights.

CSPA and FOR claimed at the hearing that revocation of the Auburn Dam permits would not mean the end of Auburn Dam, and would not limit the options available to Congress, since Reclamation could simply apply for new water rights. Yet, FOR stated in its closing brief that “it is our hope that a future State Board would not grant any permits to construct and operate the Auburn dam and Folsom-South Canal extension. And we would hope that that such uncertainty, if warranted, should influence any hypothetical reauthorization deliberations of a future Congress.” FOR Closing Brief, at 7.² At the hearing, CSPA and FOR ignored the facts that 1) any new water rights permits granted would carry a current priority date and likely would contain additional conditions and restrictions; 2) there may be less unappropriated water available; and 3) reissuance of permits would certainly not be guaranteed. The Board should decline FOR’s invitation to restrict the options that are best left open and available to Congress to debate and decide regarding the size and function of a future Auburn Dam.

At the hearing, CSPA and FOR appeared to be making an argument that all three branches of the Federal Government should be treated as one amorphous, melded unit. CSPA and FOR either expressly or impliedly stated that the Board should in some way hold Reclamation accountable for the independent, ongoing debate in the Legislative

² See also <http://www.friendsoftheriver.org/site/PageServer> (last viewed July 15, 2008) - “Help Pound Another Nail into the Auburn Dam Coffin!” (with link to send form email to Board supporting revocation); <http://www.friendsoftheriver.org/site/PageServer> (last viewed August 29, 2008) – revocation of water rights for Auburn Dam “would be another nail in the Auburn Dam coffin, diminishing its chances of ever reviving.”

Branch regarding Auburn Dam by imputing lack of due diligence upon Reclamation. Reclamation rejects this notion. CSPA and FOR completely neglect the fundamental principles of separation of powers, and the power of Congress alone to legislate and control the purse (*see, e.g.*, U.S. Constitution, Art. I, Sec. 9, Cl. 7). The Board should consider the implications if it were to find, as proposed by CSPA and FOR, that Reclamation simply did not press Congress hard enough for reauthorization of Auburn Dam, and consequently that Reclamation was therefore not diligent. If that were the case, any executive agency, whether Federal or State (including the Board), would find itself in the extremely difficult position, particularly in matters generating much public controversy, of being accused of either (1) lack of diligence for its perceived limited level of appropriations and limited authorization to act, or (2) inappropriately lobbying legislative members to promote its own interests by making laws instead of executing them. Reclamation chooses neither extreme. Reclamation also wishes to avoid any allegations by any organization with interests or viewpoints similar to those of CSPA and FOR that the Executive Branch had been abusing its power by urging Congress to make decisions, not upon an independent assessment of the merits, but as a result of inappropriate lobbying of Congress regarding an ultimately pending legislative matter. *See also* 18 U.S.C. § 1913 (prohibition against use of appropriated funds to directly or indirectly influence in any manner a Member of Congress, to favor or oppose any legislation or appropriation by Congress).

Reclamation notes that Congress has been active in assessing size, function, and funding options for the Auburn Dam (testimony of Ray Sahlberg, USBR, 8-10). Any request for

appropriations at the currently authorized cost ceiling would result in a partially-completed project, and options for amending the project authorization have and will continue to be independently assessed within Congress. Reclamation's position is that neither CSPA, FOR, or the Board, should second-guess how relations between the Executive Branch and Congress should have been best conducted regarding this federally authorized project.

Finally, the Board asked the parties to discuss the "water supply uncertainties" that would result from either revocation or allowing Reclamation to retain the permits for Auburn Dam. Reclamation can offer no advice to the Board on the possible consequences of its decision on the future of these permits. Simply put, if the Board believes that there are "conflicting and multiple applications [and] permits" involving water for Auburn Dam, then it is up to the Board, and not the permit holder, to use its judgment in determining what is in the public interest. *See* Cal. Water Code §1253 and §1255; testimony of Chris Shutes, CSPA, at 6.

CONCLUSION

It is universally recognized that California must remedy an increasing shortfall in water supply. Given California's difficult water problems, which many have described as a "crisis", nobody can truly say Congress will not reauthorize and fund Auburn Dam in the near future. CSPA and FOR noted in the hearing how times have changed since authorization of Auburn Dam and the issuance of D-1356, and ask that decisions "not be made on the assessment of conditions that are nearly a half century old." FOR Closing Brief, at 8. Yet, it appears that FOR draws the line on the viability of assessments at

about ten years, and insists that decade-old reports and studies regarding Auburn Dam (such as the American River Water Resource Investigation [ARWRI], which was prepared in 1997) are as relevant to today's circumstances as they were when they were drafted. They ignore their own advice not to look to the past, and fail to consider the current critical need for increased water supply, non-greenhouse gas emitting power generation, and water supply reliability that Auburn Dam could meet.³ Reclamation requests that the Board, in exercising its full and wide discretion in this matter, and in promoting comity, look forward, not backward. Reclamation requests that the Board carefully consider all the implications surrounding revocation, including the conditions that currently prevail in California. The Board should allow Congress to determine the future of Auburn Dam, and should make every effort to preserve the utmost cooperation of Congress in helping California deal with its current and future water and energy problems.

³ CSPA and FOR made much of the fact that Auburn Dam was not mentioned as a storage alternative by CALFED. However, it appears that this omission was not on the merits, but was the result of CSPA's and FOR's demands that Auburn Dam not be discussed as their price of their participation in the CALFED process. CSPA and FOR cannot have it both ways – they cannot now argue that CALFED did not consider Auburn Dam as a viable alternative after they threatened to withdraw from CALFED if there was any discussion of this project.